BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 13-072
	)	(Water - Enforcement)
PETCO PETROLEUM CORPORATION, an Indiana corporation,	)	
	)	
	)	
Respondent.	)	

NOTICE OF FILING

To: *See Service List*

PLEASE TAKE NOTICE that on the 5th day of February, 2025, the attached documents were filed with the Illinois Pollution Control Board, with true and correct copies attached hereto and which are hereby served upon you. The attached documents include the following:

- Notice of Filing
- Complainant's Motion to Strike Respondent's Amended Affirmative and Additional Defenses to the First Amended Complaint
- Service List and Certificate of Service

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
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of the State of Illinois

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Dated: February 5, 2025

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COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S AMENDED AFFIRMATIVE AND ADDITIONAL DEFENSES TO THE FIRST AMENDED COMPLAINT

NOW COMES COMPLAINANT, People of the State of Illinois, by KWAME RAOUL, Attorney General of the State of Illinois, by and through its undersigned counsel pursuant to Section 101.506 of the Illinois Pollution Control Board Regulations, 35 Ill. Adm. Code 101.506, and hereby submits this Complainant's Motion to Strike Respondent's Amended Affirmative and Additional Defenses to the First Amended Complaint, stating as follows:

I. INTRODUCTION

On August 31, 2022, Complainant sought leave to file its First Amended Complaint ("First Amended Complaint") in the underlying matter. On October 20, 2022, the Illinois Pollution Control Board ("Board") granted Complainant's request and accepted the First Amended Complaint. On January 18, 2023, Respondent Petco Petroleum Corporation ("Respondent" or "Petco") filed its Answer, Affirmative, and Additional Defenses to the First Amended Complaint ("Affirmative Defenses"), along with a Motion to Dismiss Counts 62 through 73 of the First Amended Complaint ("Motion to Dismiss"). On March 10, 2023, Complainant filed both a response to the Motion to Dismiss, and a Motion to Strike Respondent's Affirmative and

Additional Defenses to the First Amended Complaint ("Motion to Strike Affirmative Defenses"). The parties filed responses, replies, and sur-replies on the motions.

On August 8, 2024, the Board entered an order ("August 8, 2024 Order"), wherein the Board struck Petco's alleged affirmative defenses C and L with prejudice; struck Petco's alleged affirmative defenses A, B, D, E, F, G, J, and K, and a portion of affirmative defense H without prejudice; and granted Petco leave to amend its affirmative defenses B, D, E, F, and I, as well as a portion of affirmative defense H.

On August 22, 2024, the Board entered an order ("August 22, 2024 Order"), wherein the Board struck with prejudice the portion of Affirmative Defense H pertaining to Petco's statute of limitations argument.

On January 6, 2025, Petco filed its Amended Affirmative and Additional Defenses ("Amended Defenses"). Despite the opportunity to replead its affirmative defenses, Petco's Amended Defenses remain legally and factually insufficient. Complainant therefore files this Motion to Strike Respondent's Amended Affirmative and Additional Defenses to the First Amended Complaint ("Motion"), requesting that the Board strike Petco's Amended Defenses with prejudice.

II. LEGAL STANDARDS

Section 103.204(d) of the Illinois Pollution Control Board's regulations, 35 Ill. Adm. Code 103.204(d), establishes the requirements for all affirmative defenses. Section 103.204(d) provides in relevant part as follows:

> (d) . . . Any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing.

The Board defines an affirmative defense as the "respondent's allegation of 'new facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complaint are true.'" *People v. Community Landfill Co., Inc.*, PCB 97-193, slip op. at 3 (Aug. 6, 1998) (quoting Black's Law Dictionary). The Board has also defined an affirmative defense as a "response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." *Farmer's State Bank v. Phillips Petroleum Co.*, PCB 97-100, slip op. at 2 n. 1 (Jan. 23, 1997) (quoting Black's Law Dictionary). The Illinois Appellate Court explained in *Worner Agency v. Doyle*, 121 Ill. App. 3d 219, 221 (4th Dist. 1984), that if the pleading attacks the sufficiency of the claim, and does not admit the opposing party's claim, it is not an affirmative defense. Likewise, a defense that merely attacks the sufficiency of a claim fails to be an affirmative defense. *Id.* at 222-23. In other words, "[t]he test of whether a defense is affirmative and must be pleaded by a defendant is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated." *Id.* at 222. A true affirmative defense must offer new facts beyond those in the complaint that are capable of defeating an otherwise valid cause of action. *Pryweller v. Cohen*, 282 Ill. App. 3d 899, 907 (1st Dist. 1996). Mere defenses do not rise to the level of affirmative defenses, and accordingly should be stricken. *Id.*

Pleading mitigation factors for remedy, including civil penalty, is not a defense, much less an affirmative defense, to a claim of violation. *See, e.g., People v. Texaco Refining and Marketing, Inc.*, PCB 02-3, slip op. at 6, 7 (Nov. 6, 2003); *People v. Midwest Grain Products of Illinois, Inc.*, PCB 97-179, slip op. at 5 (Aug. 21, 1997); *People v. QC Finishers, Inc.*, PCB 01-07, slip op. at 5 (June 19, 2003). The Illinois Pollution Control Board has explicitly held that mitigation of damages is not a viable affirmative defense under the Act, stating:

> The Board . . . has determined that an affirmative defense concerning factors in mitigation with regard to any penalty that may be assessed in this matter, is not an appropriate affirmative defense to a claim that a violation has occurred. People v. Midwest Grain Products of Illinois, Inc. (August 21, 1997), PCB 97-179, slip op. at 5; People v. Douglas Furniture of California, Inc. (May 1, 1997), PCB 97-133, slip op. at 6.

People v. Geon Co., Inc., PCB 97-62, slip op. at 4 (Oct. 2, 1997).

The facts establishing an affirmative defense must be pleaded with the same degree of specificity required by a plaintiff to establish a cause of action. *Int'l Ins. Co. v. Sargent & Lundy*, 242 Ill. App. 3d 614, 630 (1st Dist. 1993). Sufficient facts must be alleged to satisfy each element of the affirmative defense. *Hartmann Realtors v. Biffar*, 2014 IL App (5th) 130543, ¶ 20. An affirmative defense that is totally conclusory in nature and devoid of any specific facts supporting its conclusions is inappropriate and should be stricken. *Int'l Ins. Co.*, 242 Ill. App. 3d at 635. *See also Farmers Auto. Ins. Ass'n v. Neumann*, 2015 IL App (3d) 140026, ¶ 16 ("the facts constituting the defense must be plainly set forth and the court will disregard any conclusions of law or fact not supported by allegations of specific fact"). The party pleading an affirmative defense need not set out evidence, so long as the party alleges the ultimate facts to be proven. *People v. Carriage 5 Way West, Inc.*, 88 Ill. 2d 300, 308 (1981). However, legal conclusions that are not supported by allegations of specific facts are insufficient. *LaSalle National Trust N.A. v. Village of Mettawa*, 249 Ill. App. 3d 550, 557 (2d Dist. 1993).

The Board has held that "[a] motion to strike an affirmative defense admits well-pled facts constituting the defense, as well as all reasonable inferences that may be drawn therefrom, and attacks only the legal sufficiency of the facts." *Elmhurst Mem'l Healthcare, et al. v. Chevron U.S.A., Inc., et al.*, PCB 09-066, slip op. at 21 (March 18, 2010), citing *Raprager v. Allstate Ins. Co.*, 183 Ill. App. 3d 847, 854 (2nd Dist. 1989). An affirmative defense should not be stricken

"[w]here the well-pleaded facts [of an affirmative defense] . . . raise the possibility that the party asserting the defense will prevail . . . ." *Raprager*, 183 Ill. App. 3d at 854.

III. ARGUMENT

1. Respondent fails to meet the pleading requirements for affirmative defenses brought against a complaint before the Board.

In its Amended Affirmative and Additional Defenses, Petco fails to designate which of its seven defenses are "affirmative defenses" and which are "additional defenses". The distinction matters. Affirmative defenses must give color to the Complainant's claim, then introduce new matter by which to defeat it. *Pryweller*, 282 Ill. App. 3d at 907. A defense, by contrast, refutes the Complainant's claim. When a defense is presented as an affirmative defense, it should be stricken. *Id.* Neither Complainant nor the Board should be required to guess which of Respondent's defenses are intended as "affirmative defenses", and which are intended as "additional defenses". Respondent's failure to identify appropriately its defenses renders its pleading legally insufficient and therefore should be stricken.

Petco further fails to identify which of its Amended Defenses relate to its original Affirmative Defenses, leaving the Complainant and the Board to draw inferences for themselves. This omission renders Petco's Amended Defenses both confusing in relation to the instructions set forth in the August 8, 2024 Order and arguably legally insufficient, further warranting they be stricken.

2. Amended Defense A: No statute of limitations applies to the allegations brought in the First Amended Complaint.

In its Amended Defense A, Petco once more seeks to invoke the statute of limitations, arguing that counts 62 through 73 of the First Amended Complaint are time-barred by Section 13-205 of the Illinois Code of Civil Procedure, 735 ILCS 5/13-205 (2022) ("Section 13-205").

The Board has already ruled against Petco on this issue. In the August 8, 2024 Order, the Board indicated it would address this issue in its ruling on Petco's Motion to Dismiss. (Aug. 8, 2024 Order at 1.) In the August 22, 2024 Order, the Board denied Petco's Motion to Dismiss, finding that because the underlying action is an "administrative proceeding", rather than a "civil action", Section 13-205 does not apply. (Aug. 22, 2024 Order at 5.) The August 22, 2024 Order struck Petco's statute of limitations affirmative defense with prejudice. Neither the August 8, 2024 Order nor the August 22, 2024 Order gave Petco leave to replead its statute of limitations affirmative defense. Amended Defense A therefore should be stricken with prejudice.

Additionally, and as previously argued, Complainant maintains it is well-established law that Section 13-205 does not apply to a governmental entity acting in the public interest, whether before the circuit court or the Board. See, *generally,* Compl. Mot. to Strike Aff. Def. (March 10, 2023); Compl. Reply to Resp. in Opp. to Compl. Mot. to Strike Aff. Def. (June 1, 2023). Instead, the courts have found that the doctrine of governmental immunity, also known as the "public interest exception", defeats any statute of limitations. See, *e.g.*, *City of Chicago v. Latronica Asphalt & Grading, Inc.*, 346 Ill. App. 3d 264 (1st Dist. 2004). See also, *generally, Complainant's Resp. in Opp. to Respondent's Mot. to Dismiss Cts. 62 through 73 of the First Am. Compl*. (March 10, 2023) and *Complainant's Sur-Reply to Respondent's Reply to Complainant's Resp. in Opp. to Respondent's Mot. to Dismiss Cts. 62 through 73 of the First Am. Compl*. (June 1, 2023).

Although Petco sought that the Board reconsider its August 22, 2024 Order, the Board declined to do so pursuant to a Board Order of December 5, 2024 ("December 5, 2024 Order"). (Dec. 5, 2024 Order at 4.) The Board should refuse to take up this argument once more, and instead strike Amended Defense A with prejudice, the matter already having been fully litigated.

3. Amended Defense B: Respondent fails to state an affirmative defense, and instead states a defense. Respondent incorrectly relies upon the standard for tort liability, which is irrelevant for the underlying action.

In its Amended Defense B, Respondent argues that "Complainant cannot prove that Petco was the cause-in-fact and/or proximate cause of the alleged discharges . . . or that Petco had the capability of controlling such discharges." (Am. Def. at 2.) Rather than give color to Complainant's claim, Respondent instead asserts that Complainant has failed to state a claim. Amended Defense B therefore fails as an affirmative defense for being legally insufficient.

Petco also relies upon incorrect standards for liability, further rendering its Amended Defense B legally insufficient. Liability is not based in tort, but upon the statutory requirements to show a violation. Per Section 12(a) of the Act, 415 ILCS 5/12(a) (2022), a respondent incurs liability when its actions:

> (a) *Cause or threaten or allow* the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act. (emphasis added)

The test for liability is if a respondent's actions cause, threaten, or allow a discharge of contaminants, in whole or in part, with liability being joint and several.

"[I]t is no defense that another party may have been partially responsible for the pollution." *People v. A.J. Davinroy Contractors*, 249 Ill. App. 3d 788, 795 (5th Dist. 1993). A person may violate the Act without intent, or even knowledge of the pollution. "The Act is *malum prohibitum*; for a violation to be found, it is not necessary to prove guilty knowledge or *mens rea*." *Id.* at 793 (5th Dist. 1993) (citing *Meadowlark Farms, Inc. v. Pollution Control Bd.*, 17 Ill. App. 3d 851 (5th Dist. 1974)). What must be shown is that "the alleged polluter has the capability of control over the pollution or that the alleged polluter was in control of the premises where the pollution

occurred." *A.J. Davinroy Contractors*, 249 Ill. App. 3d at 793 (citing *Phillips Petroleum Co. v. Pollution Control Bd.*, 72 Ill. App. 3d 217 (2d Dist. 1979)).

The scope of civil liability under the Act is intentionally broad. *See* 415 ILCS 5/2(b), (c) (2022) (providing that the civil provisions of the Act "shall be liberally construed" to effectuate its purposes to "restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them"). This broad scope of liability is demonstrated well by *Meadowlark Farms, Inc. v. Pollution Control Board,* 17 Ill. App. 3d 851 (5th Dist. 1974), which establishes that even passive control of a pollution site is sufficient to establish civil liability under the Act, with the court finding that Meadowlark's property interest in the surface rights of an abandoned mine site was enough to show a violation. *Id*. at 861.

In all four instances cited by Respondent, the source of the discharged crude oil and salt water—be it a flowline, a production well, or a tank battery—was operated by Petco. In Count XXIV, crude oil and salt water discharged from a Petco-operated pipeline. (First Am. Compl. Ct. XXIV, ¶ 18.) In Count XLII, crude oil discharged from a Petco-operated production well. (First Am. Compl., Ct. XLII, ¶ 18.) In Count LVII, crude oil and salt water discharged from a Petco-operated flowline. (First Am. Compl., Ct. LVII, ¶ 18.) In Count VII, salt water discharged from a Petco-operated tank battery. (First Am. Compl., Ct. VII, ¶ 18.) In each situation, Petco operated the equipment that discharged oil and salt water into the environment. Petco may not have intended the discharges, but intent is irrelevant; control over the source of the contamination is the key. Under the broad scope of civil liability under the Act, it is therefore not a defense (and certainly not an affirmative defense) to argue that Complainant failed to establish causation pursuant to the

standard for tort liability. Complainant requests the Board strike Respondent's Amended Defense B with prejudice.

4. Amended Defense C: Respondent fails to assert the elements required for an affirmative defense of laches. Respondent fails to plead sufficient facts; fails to show Complainant lacked due diligence; fails to show Respondent was prejudiced thereby; and fails to show that extraordinary circumstances exist warranting the application of laches against a government entity.

Respondent asserts an affirmative defense of laches in its Amended Defense C. The doctrine of laches bars relief where, as a result of a plaintiff's unreasonable delay in asserting his right, a defendant has been misled or prejudiced. *Whitlock v. Hilander Foods, Inc.*, 308 Ill. App. 3d 456, 464 (2d Dist. 1999) (citing *Tully v. State*, 143 Ill. 2d 425, 432 (1991)). The delay must be unreasonable. *See City of Rolling Meadows v. Nat'l Advertising Co.*, 228 Ill. App. 3d 737, 745-46 (1st Dist. 1992). In determining whether the doctrine of laches applies, the court must examine all the circumstances, including whether a defendant's conduct contributed to the delay about which it complains or whether a defendant knew it was violating a right, and chose to do so with disregard for the consequences. *Whitlock*, 308 Ill. App. 3d at 64. The law is clear, however, that laches do not apply to governmental entities except in extreme circumstances. *People v. Environmental Waste Resources, Inc.*, 335 Ill. App. 3d 751, 755 (3rd Dist. 2002). There is considerable reluctance to impose the doctrine of laches to the actions of public entities unless unusual or extraordinary circumstances are shown. *Van Mulligan v. Bd. of Fire & Police Com'rs of Village of Glenview*, 158 Ill. 2d 85, 90 (1994); see *Hickey v. Illinois Central Railroad*, 35 Ill. 2d 427, 447 (1966). The courts have found that:

> Generally, principles of laches are applied when a party's failure to timely assert a right has caused prejudice to the adverse party . . . The two fundamental elements of laches are lack of due diligence by the party asserting the claim and prejudice to the opposing party.
>
> * * *

> There is considerable reluctance to impose the doctrine of laches to the actions of public entities unless unusual or extraordinary circumstances are shown. This is so because laches "may impair the functioning of the [governmental body] in the discharge of its government functions, and * * * valuable public interests may be jeopardized or lost by the negligence, mistakes, or inattention of public officials." Although "the reluctance to apply equitable principles * * * does not amount to absolute immunity * * * from laches and estoppel under all circumstances," it has been recognized that laches does not apply to the exercise of governmental powers except under "compelling circumstances."

Van Milligan v. Bd. of Fire & Police Comm'rs, 158 Ill. 2d 85, 89–91 (1994) (internal citations omitted). *See also People v. Big O, Inc.*, PCB 97-130, slip op. at 2 (Apr. 17, 1997).

Respondent both fails to plead sufficient facts in support of its affirmative defense and fails to demonstrate it was prejudiced by Complainant's actions. Instead, Respondent makes a blanket assertion that the passage of time may have "render[ed] witnesses no longer accessible and/or diminish[ed] the completeness of witness memories . . . leading to the loss of pertinent information and/or documents". Petco merely sets forth a conclusory assertion that the passage of time is prejudicial, without demonstrating *how* Petco has been prejudiced. In failing to plead sufficient facts, Petco also fails to meet the first of the three elements for an affirmative defense of laches, namely, demonstrating that Petco was prejudiced by delay.

Petco further fails to show a lack of due diligence on the part of Complainant. As the docket for the underlying case shows, the parties engaged in extensive settlement negotiations over the course of many years, from shortly after the inception of the case in 2013 until negotiations were reported to be at an impasse in 2021. (See, *generally*, PCB Case No. 2013-072 Docket.) Such considerable efforts to reach a settlement are, in fact, the opposite of a lack of due diligence, and Respondent offers nothing to indicate otherwise. The inability to reach a settlement agreement does not indicate a lack of initiative; it simply indicates the inability of the parties to come to an

accord.[1] Petco fails to meet the second of the three elements for an affirmative defense of laches, namely, demonstrating that Complainant failed to exercise due diligence.

Notably, Petco further fails to meet the third of the three elements required for laches, namely, a showing of unusual or extraordinary circumstances that would warrant a finding of laches against a governmental entity. Petco fails to assert, much less demonstrate, that any unusual or extraordinary circumstances exist to support a finding of laches against the State.

Petco fails to establish the three elements necessary for an affirmative defense of laches against the State. Complainant requests Amended Defense C be stricken with prejudice.

5. Amended Defense D: Respondent's defense seeks to introduce a new defense in contradiction with the August 8, 2024 Order. Respondent further fails to state an affirmative defense; cites extrinsic matter that is irrelevant to the underlying action; and fails to plead sufficient facts.

The Board's August 8, 2024 Order granted Petco the right to amend its original Defenses B, D, E, F, and I, as well as a portion of Defense H. The August 8, 2024 Order did not grant Petco leave to introduce a new defense. In its Amended Defense D, Petco introduces an entirely new defense that falls outside the scope of its original defenses, arguing that—pursuant to an agreement Petco claims existed between Petco and the Illinois Department of Natural Resources ("Illinois DNR")—Petco upgraded certain features of the oil field it operates in Fayette County, Illinois. Petco further argues that the Board should tailor any injunctive relief ordered in this case to the work Petco claims it already performed in said oil field. Petco's effort to introduce a new defense does not comply with the August 8, 2024 Order, and therefore should be stricken with prejudice.

[1] Even if the Board were to accept Petco's argument that failure to reach a settlement shows a lack of due diligence, then Petco—as a party to the settlement negotiations—would likewise share the blame for failure to reach an agreement. And, since the case law shows that laches does not apply where a defendant contributes to the underlying delay, Petco's own logic leads to the conclusion that laches would be inapplicable.

Even if the amended defense were subject to argument, it does not withstand scrutiny, as Respondent fails to state or identify an actual affirmative defense in its Amended Defense D. Petco neither gives color to Complainant's claims, nor asserts new matter that would defeat Complainant's cause of action. Instead, Petco seeks to limit the scope of injunctive relief that the Board might authorize. Pleading mitigation factors is not an affirmative defense. See, *e.g.*, *People v. Texaco Refining and Marketing, Inc.*, PCB 02-3, slip op. at 6, 7 (Nov. 6, 2003); *People v. Midwest Grain Products of Illinois, Inc.*, PCB 97-179, slip op. at 5 (Aug. 21, 1997); *People v. QC Finishers, Inc.*, PCB 01-07, slip op. at 5 (June 19, 2003); *People v. Geon Co., Inc.*, PCB 97-62, slip op. at 4 (Oct. 2, 1997). A request for limiting the scope of the remedy cannot be advanced at this stage because it does not assert a new matter defeating Complainant's cause of action, and therefore should be stricken.

Moreover, subsequent compliance is not an affirmative defense. Although subsequent compliance may go to the determination of an acceptable penalty, it is not a defense to liability in the first place. *See* 415 ILCS 5/42(h) (2022) (setting out penalty factors including the duration of the violations and the Respondent's diligence in correcting the violation).

Amended Defense D also fails as a matter of law for the reason that there is no legal basis to limit relief granted to the Illinois Environmental Protection Agency ("Illinois EPA")—on whose behalf the underlying case is brought—based on settlement negotiations (especially failed ones) with a State agency that is not a party to this case.[2] As previously discussed, the underlying case is brought on behalf of the Illinois EPA pursuant to the Illinois Environmental Protection Act

[2] Respondent appears to be referring to settlement negotiations between Petco and the Illinois Department of Natural Resources. Settlement negotiations ultimately failed, and the result is a lawsuit pending before the Sangamon County Circuit Court (*People v. Petco Petroleum Co.*, Sangamon Co. Case No. 2022-CH-8). Despite Petco's claim that it reached a settlement agreement with Illinois DNR, the Department has been clear that no such agreement existed, as evidenced by its lawsuit currently pending in Sangamon County, and as further set forth in its Reply to Petco's affirmative defenses in that matter, attached hereto as Exhibit A. In any event, Illinois DNR is not a party to this case, and so the question is irrelevant.

("Act"). (Compl. Mot. to Strike at Sec. III.5, III.6.) The Illinois DNR is not a party to this action, and violations of the Illinois Oil and Gas Act ("IOGA") are not the subject of this action. Complainant seeks relief on 73 counts citing violations of the Act. Complainant is authorized to seek relief for violations that occurred under the Act. 415 ILCS 5/42 (2022). Respondent cites nothing in the Act that would constrain Complainant from seeking relief. In this case, and as set forth in the prayer for relief in the First Amended Complaint, Complainant is seeking, among other relief, that Respondent be ordered to "cease and desist from any further violations of the Act and associated regulations" and that a civil penalty be assessed against Respondent pursuant to Section 42(a) of the Act, 415 ILCS 5/42(a) (2022). Regardless of whatever improvements Petco believes it has made to its oil field, the real test for compliance in the present matter will be if Petco's alleged improvements result in the cessation of violations of the Act.

Petco's Amended Defense D is also factually insufficient. While setting forth a long list of steps that Petco claims it has implemented in its oil operations writ large, Petco fails to identify how these steps relate to the individual counts brought in the First Amended Complaint. Each count in the First Amended Complaint identifies a particular piece of equipment—be it a wellhead, a flowline, a tank battery, or other component—from which a discharge occurred. Petco makes no effort to identify what remediation steps have occurred to the individually identified pieces of equipment, leaving Complainant and the Board to guess for themselves if, and how, the equipment referenced in a given count was repaired and updated. The lack of specificity in Petco's pleading renders Amended Defense D factually insufficient, and should be stricken.

Respondent's argument goes beyond the bounds of the amendments allowed by the August 8, 2024 Order. Respondent's argument is not a defense, and certainly not an affirmative defense.

Respondent's argument is legally and factually insufficient. Respondent's Amended Defense D therefore should be stricken with prejudice.

6. Amended Defense E: Mitigating factors do not constitute a valid affirmative defense. Costs spent on remediation do not warrant a reduction in civil penalty. Actions taken to satisfy another State agency are irrelevant for determining liability pursuant to the Act.

Amended Defense E fails to state an affirmative defense, and instead seeks to reduce the amount of any civil penalty award in the underlying action. Respondent's claim of mitigation of damages fails as a legally sufficient affirmative defense because it does not assert any facts that invalidate the State's cause of action. See *Vroegh v. J & M Forklift*, 165 Ill. 2d 523, 530 (1995). The Board has explicitly held that mitigation of damages is not a viable affirmative defense under the Act. See, *e.g.*, *People v. Texaco Refining and Marketing, Inc.*, PCB 02-3, slip op. at 6, 7 (Nov. 6, 2003); *People v. Midwest Grain Products of Illinois, Inc.*, PCB 97-179, slip op. at 5 (Aug. 21, 1997); *People v. QC Finishers, Inc.*, PCB 01-07, slip op. at 5 (June 19, 2003); *People v. Geon Co., Inc.*, PCB 97-62, slip op. at 4 (Oct. 2, 1997). Respondent cites to no case upholding mitigation of damages as a valid affirmative defense to environmental enforcement actions under the Act. Amended Defense E fails to constitute a legally valid defense to violations of the Act and should be stricken with prejudice.

Moreover, there is no specific provision under Section 42(h) of the Act for set-off. On the contrary, Section 42(h) includes factors related to the presence or absence of due diligence in remediating the contamination and any economic benefits accrued by the defendant because of a delay in compliance. To the extent the Board considers any costs spent by Petco on remediation, the Board should do so taking into account the lack of Respondent's due diligence in maintaining its oil field, any delay in accomplishing remediation, and any economic benefit derived therefrom. Subsequently upgrading equipment so it operates in conformity with the law does not warrant a

reduction in civil penalty; such efforts are merely the work that should have been done to avoid the violations that gave rise to the First Amended Complaint.

Additionally, and as outlined in Section III.5, *supra*, any work that Petco took while engaged in discussions with Illinois DNR are irrelevant to the violations alleged in the First Amended Complaint. Further, Respondent fails to explain how the costs described in Amended Defense E are related to any of the equipment referenced in the counts of the First Amended Complaint, rendering the defense factually insufficient.

Because neither mitigating factors nor subsequent compliance constitute a valid affirmative defense; because costs spent on remediation do not warrant a reduction in civil penalties; and because Respondent references matter that is irrelevant to the underlying action and factually insufficient, Petco's Amended Defense E should be stricken with prejudice.

7. Amended Defense F: Mitigation of damages does not constitute a valid affirmative defense. There is no provision for set-off under the Act. Bonds posted with Illinois DNR for violations of the IOGA are irrelevant to civil penalties sought by Illinois EPA for violations of the Act.

Amended Defense F fails to state an affirmative defense, and instead once more seeks to reduce the amount of a civil penalty award in this case. As in Amended Defense E, Respondent's claim of mitigation of damages fails to assert facts that invalidate the State's cause of action, and therefore fails as a legally sufficient affirmative defense. *Vroegh*, 165 Ill. 2d 523, 530 (1995). Again, the Board has held that mitigation of damages is not a viable affirmative defense under the Act. See, *e.g., People v. Texaco Refining and Marketing, Inc.*, PCB 02-3, slip op. at 6, 7 (Nov. 6, 2003); *People v. Midwest Grain Products of Illinois, Inc.*, PCB 97-179, slip op. at 5 (Aug. 21, 1997); *People v. QC Finishers, Inc.*, PCB 01-07, slip op. at 5 (June 19, 2003); *People v. Geon Co., Inc.*, PCB 97-62, slip op. at 4 (Oct. 2, 1997). Respondent fails to cite any case law to the contrary.

Further, as discussed, *supra*, there is no provision for set-off under the Act, and expenditures toward subsequence compliance do not warrant a reduction in a civil penalty under the Act.

Again, it is wholly irrelevant to the present case whether Petco posted bonds with Illinois DNR for violations under the IOGA. Illinois DNR is not a party to this case, and this case is not brought under the IOGA. Instead, the First Amended Complaint is brought on behalf of Illinois EPA pursuant to the Act.

Petco indicates it posted bonds pursuant to 62 Ill. Adm. Code 240.180, which states in part as follows:

> (a) . . . A person or permittee seeking to contest any Director's decision in which a civil penalty has been assessed shall submit the assessed amount to the Department, by cashier's check or money order, together with a timely request for hearing. The assessed amount shall be deposited by the Department pending the outcome of the hearing. The assessed amount shall be refunded to the person or permittee at the conclusion of the hearing if the Department does not prevail.

The bonds that Petco reports as having posted apparently were submitted so that Petco could contest the outcome of Director's Decisions issued by Illinois DNR. It is unclear why Petco believes that: (a) Illinois EPA would have authorization to access bonds posted with another State agency (b) for the purpose of litigating violations that occurred pursuant to a statute that Illinois EPA does not enforce. In any case, Petco does not cite any authority for its position.

The Act and the IOGA relate to differing jurisdictions and competencies. The Act and the IOGA are two separate statutes, with their own distinct concerns, outlining two separate sets of violations. Violations litigated pursuant to the IOGA are not the same as those litigated pursuant to the Act. Bonds posted pursuant to the IOGA are for matters separate and distinct from civil

penalties assessed under the Act. The bonds that Petco cites in its separate litigation with Illinois DNR are irrelevant to this case, and Amended Defense F should be stricken with prejudice.[3]

8. <u>Amended Defense G: Mitigation of damages does not constitute a valid affirmative defense. There is no provision for set-off under the Act. Bonds posted with Illinois DNR for violations of the IOGA are irrelevant to civil penalties sought by Illinois EPA for violations of the Act, and no agreement exists to the contrary.</u>

Again, Complainant notes that while the Board's August 8, 2024 Order granted Petco the right to amend its original Defenses B, D, E, F, and I, and a portion of Defense H, the order did not grant Petco leave to introduce a new defense. In its Amended Defense G, Petco introduces a new defense that falls outside the scope of its original defenses, arguing that "under the doctrine of accord and satisfaction" Petco is entitled to discount from any assessed civil penalty in this action the bonds it has posted with Illinois DNR for separate proceedings. As a new defense, Amended Defense G does not comply with the terms of the August 8, 2024 Order, and therefore should be stricken with prejudice.

Additionally, outside of the new material introduced by Petco, Amended Defense G is repetitive in many ways of Amended Defense F, and so should be stricken with prejudice for all the reasons outlined in Section III.7, *supra*, namely that: (a) Petco's claim of mitigation of damages fails to assert facts that defeat the State's cause of action, and therefore fails to state a legally sufficient affirmative defense; (b) mitigation of damages is not an affirmative defense; (c) there is no provision for set-off under the Act; (d) bonds posted with Illinois DNR for violations of the IOGA are irrelevant for the awarding of a civil penalty to Illinois EPA pursuant to the Act; (e)

[3] It is worth noting that the regulations to the IOGA define the term "bond" stating that: "Bond means surety bond or other security in lieu thereof." 62 Ill. Adm. Code 240.1510. By functioning as a surety, a posted bond guarantees that a payment owed to someone will be made. If the Board allowed Petco to reduce the final assessed civil penalty owed to Illinois EPA in this action by relying upon a bond that Petco posted to guarantee a payment to Illinois DNR, the Board would be devaluing the worth of the original bond, jeopardizing not only Illinois DNR's ability to recover fully on what it is owed pursuant to the IOGA, but also Illinois EPA's ability to obtain a full recovery on a civil penalty under the Act.

Illinois EPA does not have authority to help itself to bonds posted by Petco with Illinois DNR; and (f) allowing Petco to reduce its civil penalty undercuts the value of the bond posted with Illinois DNR.

Additionally, Petco while claims that the doctrine of accord and satisfaction somehow entitles Petco to a reduction of a civil penalty, it is unclear what Petco means by this statement. The doctrine of accord and satisfaction implies the existence of an agreement. Petco does not identify any agreement that would allow Illinois EPA access to bond funds posted with Illinois DNR.[4] The underlying case has not been settled. There is no settlement agreement preventing Illinois EPA from pursuing a civil penalty under the Act. Accordingly, Amended Defense G should be stricken with prejudice.

IV. CONCLUSION

Respondent's Amended Defenses fail to meet Illinois pleading standards. The defenses are all legally and/or factually insufficient and should be stricken with prejudice.

WHEREFORE, Complainant, People of the State of Illinois, respectfully requests that the Board enter an order striking with prejudice the amended affirmative and additional defenses alleged by Respondent, PETCO PETROLEUM CORPORATION, pursuant to Section 101.506, 35 Ill. Adm. Code 101.506, and granting Complainant such other relief that the Board deems appropriate and just.

[4] If Petco is once again referencing the purported "agreement" it cites in Amended Defense D, Complainant reiterates that: (a) Illinois DNR refutes any settlement agreement with Defendant in its filings in Sangamon Co. Case No. 2022-CH-8 (*see* Exhibit A, attached hereto); (b) the lack of a settlement agreement is evident by virtue of the pending lawsuit in Sangamon County; and (c) regardless of the existence or lack thereof of an agreement between Petco and Illinois DNR, it is a question completely irrelevant to whether Illinois EPA is entitled to a civil penalty in the present matter.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
by KWAME RAOUL,
Attorney General of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/
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By: /s/ Natalie Long
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Date: February 5, 2025

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11/18/2022 12:59 PM
Paul Palazzolo
7th Judicial Circuit
Sangamon County, IL
2022CH000008

IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, *ex rel*. KWAME RAOUL, Attorney General of the State of Illinois,	)	
Plaintiff,	)	
v.	)	No. 22-CH-8
PETCO PETROLEUM CORPORATION, an Indiana corporation,	)	
Defendant.	)	

PLAINTIFF'S REPLY TO DEFENDANT'S AMENDED AFFIRMATIVE DEFENSES

NOW COMES Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, *ex rel*. KWAME RAOUL, Attorney General of the State of Illinois, ("Plaintiff"), and hereby replies to Defendants' Amended Affirmative Defenses, pursuant to Section 2-602 of the Code of Civil Procedure, 735 ILCS 5/2-602 (2020):

Affirmative Defense A. ("Lack of Jurisdiction")

The Department, and therefore the State, lacks jurisdiction to adjudicate this matter as the Department exceeded its rule making authority when it promulgated 62 Ill.Adm.Code 240.16(g) [sic] (the "Regulation") and removed the statutory requirement in 225 ILCS 725/8a ("Section 8a") that the Director shall issue a final administrative order.

"Any power or authority claimed by an administrative agency must find its source within the provisions of the statute by which the agency was created." *Schalz v. McHenry County Sheriff's Department Merit Commission*, 113 Ill.2d 198, 202 (1986). Such an agency "only has such authority as is conferred by express provision of law or is found, by fair implication and intendment, to be incident to and included in the authority expressly conferred for the purpose of carrying out and accomplishing the objectives for which the agency was created." *Aurora East Public School District v. Cronin*, 92 Ill.App.3d 1010, 1014 (2nd Dist. 1981). "If an agency promulgates rules beyond the scope of the legislative grant of authority, the rules are invalid, as are any rules that conflict with the statutory language under which the rules are adopted." *R.L.*

Exhibit A

Polk & Co. v. Ryan, 296 Ill.App.3d 132, 141 (4th Dist. 1998); See also *Estate of Slightom v. Pollution Control Board*, 2015 IL App (4th) 140593, *P25 (Where an administrative rule conflicts with the statute under which it was adopted, the rule is invalid). "Because agency action for which there is no authority is void, it is subject to attack at any time in any court, either directly or collaterally." *Daniels*, 166. "Even if the parties themselves do not raise the question, courts have an independent duty to vacate and expunge void orders, and thus may *sua sponte* declare an order void." *Id.*

Section 8a specifically provides that the Director shall (1) "serve the person or permittee with his decision at the conclusion of the investigation" and (2) "within 30 days of the close of the hearing record or expiration of the time to request a hearing, the Department shall issue a final administrative order." Petco received Director's Decisions, but the Department, relying on the regulation, did not issue a final administrative order. For example, the Department served Petco a Director's Decision on Lewis Huffman #1 well, IDHR Case No. 200227 [sic] on April 8, 2020, (Exhibit B-13) and has taken the position that the same document is the final administrative order (Exhibit C-131).

To date no final administrative order complying with Section 8a has been served on Petco, and thus it cannot challenge the Department's actions in accordance with the Illinois Administrative Act.

REPLY: Affirmative Defense A. consists of legal conclusions, to which no reply is required. To an extent any reply is required, Plaintiff admits that, because Petco failed to timely request hearings on Director's Decisions issued to it by the Department, thereby waiving administrative review pursuant to Section 8a of the Oil and Gas Act, 225 ILCS 725/8a (2020), those Director's Decisions serve as the Department's final administrative orders pursuant to Section 240.160(g) of the Department's Oil and Gas Act Regulations, 62 Ill. Adm. Code 240.160(g). Plaintiff denies the remainder of Defendant's allegations, and, consistent with Section 2-602 of the Code of Civil Procedure, 735 ILCS 6/2-602 (2020), denies that Defendant's Affirmative Defense A. constitutes a legally sufficient defense.

Affirmative Defense G. [Untitled].

On or about the last week of February 2016, the Department and Petco reached an agreement that during settlement negotiations involving numerous pending Director's Decisions and Notices of Violation ("NOVS") sent to the Director involving Petco's operation of an oil field in Fayette County, Illinois, named the "Loudon Field." The terms of the agreement were that during the negotiations for settlement of the Director's Decisions and NOVS involving the Loudon field and other Director's Decisions and NOVS in Jefferson County, Illinois, Petco would retain a consultant acceptable to the Department to perform an investigation of the Loudon Field and recommend actions necessary to reduce the number and frequency of spills in the Loudon Field, and during the negotiation of a Settlement Agreement no additional Director's Decisions assessing civil penalties against Petco would be issued. In reliance on the settlement agreement, Petco retained Blackshare Consulting, and on October 5, 2016, it issued a report setting forth recommendations of actions to be taken at the Loudon Field to reduce the number and frequency of the spills. Petco has implemented Blackshare's compliance recommendations, including but not limited to:

1) identifying and burying all exposed creek, stream, or ravine flowline crossings used by Petco in compliance with 62 Ill.Adm.Code §240.820;
2) installing valves on all gravity flowlines and all disposal lines upstream of sumps as necessary to ensure that flow can be isolated in the event of a power failure;
3) instituting a tank level indicator inspection program;
4) identifying, replacing, and burying any transit piping exposed in a roadway;
5) installing inserts between the top joint and swedge on the majority of the class II injection wells with 1.5 inch tubing on wells that did not have inserts, and, for the remaining wells, instituted a plan that requires the inspection of all injection wells at the time the well is pulled for maintenance to determine if an insert is present, and if an insert is not present, to then install inserts between the top joint and swedge;
6) replacing a majority of the top joints on the operational production wells identified by Petco to be without a packer with aluminum bronze material or with stainless steel top joints, and, for the remaining wells, instituted a plan that requires the inspection operational production wells when pulled for maintenance and replace or install a new top joint of aluminum bronze material or stainless steel, if needed;
7) within thirty-six (36) months of a temporarily abandoned production well's return to service, replacing the well's top joint with aluminum bronze material or stainless steel material, if needed;
8) replacing the majority of the steel nipples with stainless steel on aluminum/bronze pumping tees and, for the remaining wells, instituted a plan to inspect the operational production well when pulled for maintenance and replace any existing carbon nipple with stainless steel on aluminum/bronze pumping tees;
9) replacing the majority of carbon-steel headers with stainless steel or fiberglass headers, and, for the remaining headers, instituted a plan to replacing the remaining carbon steel headers;
10) removing and properly disposing of all excess fluids within all containment areas, including, but not limited to all sumps, pits, production well sites, injection well sites, and tank battery sites enclosed by an earthen dike or berm, concrete barrier, or other structure designed to prevent fluids released from oil field facilities into the environment;
11) instituting a plan that includes a visual check of the sump pumps to verify they are working correctly at each containment area that has a sump pump;
12) instituting a Protocol for Pigging of all disposal lines that require pigging and are physically capable of being pigged;
13) putting in place a herbicide application plan, consistent with all applicable laws and regulations, to apply herbicides within the perimeter of all containment areas enclosed by an earthen dike, berm, or other structure in which vegetation normally grows or reasonably may grow;
14) implementing a water sampling and treatment program for the Loudon Field to reduce the corrosiveness of water circulating and thereby reduce corrosion of piping and fittings; and
15) requiring that personnel are physically present onsite at the Loudon field twenty-four (24) hours a day, seven (7) days per week to ensure that operations and conditions are regularly and frequently viewed.

Petco has continued to follow the Blackshare recommendations, even though the Department is now issuing Director's Decisions and NOVS. See Affidavit of Eliott Hedin attached hereto.

The Department has acknowledged the existence of the Settlement Agreement negotiation in each of its Director's Decisions and alleged final administrative orders listed in Exhibit C by stating "In

accordance with pending settlement negotiations only violations issued subsequent to September 6, 2019 were considered."

The alleged final administrative orders listed in Exhibit C are on their face and in the Certificate of Service are titled Director's Decisions and not final administrative orders as required by Section 8a.

REPLY: Plaintiff admits that, during February 2016, representatives of the Department and Petco met and engaged in settlement discussions toward a potential settlement agreement, through which the parties would settle pending Notices of Violations ("NOVs") and Director's Decisions ("DDs") issued against Petco by the Department. Plaintiff denies that the Department and Petco reached a settlement agreement during that meeting or at any time thereafter. Plaintiff admits that the Department voluntarily ceased issuing new DDs against Petco after the February 2016 meeting and continuing through September 6, 2019, during which time the Department and Petco conducted further settlement negotiations. Plaintiff admits that, on or about October 5, 2016, Petco submitted to the Department a consultant's report analyzing the causes of releases at Petco's Loudon field and recommending actions to reduce releases. Plaintiff denies that Defendant has fully implemented the consultant's recommendations through the filing date of this Reply. Plaintiff lacks sufficient knowledge regarding specific actions taken by Petco to implement the consultant's recommendations to admit or deny the specific allegations in subsections (1)-(15) of Affirmative Defense G. Plaintiff denies that the Department has ever acknowledged the existence of a settlement agreement with Petco. Plaintiff admits that, due to the parties' inability to reach a settlement agreement, the Department, through its attorneys, advised Petco in a letter of August 14, 2019 that the Department would resume administrative enforcement proceedings against Petco on all future violations, beginning on September 1, 2019. Plaintiff denies the remainder of Defendant's allegations, and, consistent with Section 2-602 of the Code of Civil Procedure, 735 ILCS 6/2-602 (2020), denies that Defendant's Affirmative Defense G. constitutes a legally sufficient defense.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. KWAME RAOUL,
Attorney General of the
State of Illinois

By: /s/ Andrew Armstrong

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DATE: November 18, 2022

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* KWAME RAOUL, Attorney General of the State of Illinois,	)	
Plaintiff,	)	
v.	)	No. 2022-CH-8
PETCO PETROLEUM CORPORATION, an Indiana corporation,	)	
Defendant.	)	

AFFIDAVIT

I, Dan Brennan, being duly sworn, on oath state as follows:

1. I am currently employed by the Illinois Department of Natural Resources ("Department") in Springfield, Illinois as Director of Oil & Gas Resource Management.

2. I have been employed by the Department in my current position since February 2019. I began with the Department in September 2014 as an Environmental Protection Legal Investigator. In June 2017, I was employed as a Legal Advisor with the Department's Office of Legal Counsel.

3. As relevant to the underlying action, the duties and responsibilities of my position include: supervising the Department's Office of Oil and Gas Resource Management, which includes the Office Field and Enforcement units. The Field Unit inspects all oil and gas wells in Illinois, along with their related facilities. The Enforcement Unit investigates all Notices of Non-Compliance and Notices of Violation, and issues any Director's Decisions based on their investigations.

4. In the course of my employment with the Department, I have obtained knowledge concerning Defendant Petco Petroleum Corporation's operations in the Loudon oil field.

5. I have read the foregoing Reply to Defendant's Amended Affirmative Defenses, and am aware of the contents thereof.

6. Pursuant to Section 2-610(b) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-610(b), I lack sufficient knowledge to form a belief as to specified facts within Defendant's Affirmative Defense G.

7. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

FURTHER AFFIANT SAYETH NOT

Daniel M. Brennan

Daniel M Brennan
Director of Oil & Gas Resource Management
Illinois Department of Natural Resources

November 17, 2022

Date

CERTIFICATE OF SERVICE

I hereby certify that I did on November 18, 2022, send by electronic mail, a true and correct copy of the document entitled PLAINTIFF'S REPLY TO DEFENDANT'S AMENDED AFFIRMATIVE DEFENSES to:

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/s/Natalie Long
Natalie Long
Assistant Attorney General

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this certificate of service are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

/s/Natalie Long
Natalie Long
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CERTIFICATE OF SERVICE

I, Natalie Long, an Assistant Attorney General, certify that on the 5th day of February, 2025, I caused to be served the foregoing Notice of Filing, Complainant's Motion to Strike Respondent's Amended Affirmative and Additional Defenses to the First Amended Complaint, and Service List and Certificate of Service on the parties named on the attached Service List, by email or electronic filing, as indicated on the attached Service List.

/s/ Natalie Long
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